

ROUTING AND TRANSMITTAL SLIP

Date

12 Jul 83

TO: (Name, office symbol, room number,
building, Agency/Post)

Initials

Date

1. D/ES

2.

3.

4.

5.

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

Per our earlier conversations, attached are copies of correspondence forwarded by OL re Spacesaver Systems. Reference is ER 83-2915.

↑
ER Action Complete

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)

Room No.—Bldg.

Phone No.

5041-102

OPTIONAL FORM 41 (Rev. 7-76)

Prescribed by GSA
FPMR (41 CFR) 101-11.206

STAT

STAT

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

DD/A Registry
83-1467/10

5 July 1983

att: OEXA 1507/A-83
ER 83-29151

Seymour Efros, Esquire
Associate General Counsel
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Efros:

Re: Procurement Document: RFP 83A-160
Issuing Activity: Central Intelligence Agency
Contract: No. 83-A822700-000
Awarded 26 May 1983
Your Reference No. B-211817

I have been asked to respond to your letter of 2 June 1983, advising the Central Intelligence Agency (CIA or Agency) that a bid protest has been filed by Spacesaver Systems, Inc., a Maryland corporation. This report will describe the factual situation on which the bid protest is founded and the Agency's position on the matter.

EXECUTIVE SUMMARY

Spacesaver Systems, Inc. (Spacesaver), has filed a bid protest, in the form of three letters to the General Accounting Office (GAO) and one letter to Congressman Michael D. Barnes, protesting the award of CIA Contract No. 83-A822700-000 on 26 May 1983 to REMCO Business Systems, Inc. The first letter was filed the day after contract award, 27 May 1983. The second was filed on 31 May 1983, and the third was filed on 3 June 1983. These letters raise four basic issues concerning the propriety of the competition.

L277

Seymour Efros, Esquire

First, Spacesaver is "challenging the assertion of REMCO Business Systems that they satisfy all specifications of the subject RFP." (Letter of 27 May 1983.) The Agency's position is that any determination of whether REMCO is capable of meeting the requirements of the solicitation requires an affirmative determination of responsibility by the contracting officer, which has been made, and is not subject to GAO review under Bid Protest Procedures absent a showing of fraud. (Aerosonic Corporation, B-193469, January 19, 1979, 79-1 CPD 35.)

Second, Spacesaver protests that "CIA did not use the GSA Federal Supply Schedule." (Letter of 31 May 1983.) The Agency did not use the schedule because the procurement was anticipated to exceed the Maximum Order Limitation of the schedule, and the appropriate authorization exempting the Agency from the schedule had been granted by GSA. Further, since the Agency's decision not to use the schedule was clearly apparent on the face of the Request for Proposals (RFP), the Spacesaver protest is untimely and should have been raised before the closing date for receipt of initial proposals. (4 CFR § 21.2(b)(1); Precision Environments, Inc., B-198418, April 29, 1980, 80-1 CPD 306.)

Third, Spacesaver claims the procurement "should have been a total small business set aside." (Letter of 31 May 1983.) This bid protest was registered well after the closing date for receipt of proposals, even though the contracting officer had decided not to

Seymour Efröds, Esquire

make this procurement a small business set-aside, and his decision was reflected on the face of the initial RFP.

The protest is, therefore, untimely. (4 CFR § 21.2(b)(1); J.H. Rutter Rex Manufacturing Co., Inc., B-184157, February 23, 1976, 76-1 CPD. 122.) In addition, "the contracting officer has broad discretion under the Small Business Act ... whether or not to set aside a particular procurement." (Bell & Howell, B-206333, September 14, 1982, 82-2 CPD 224.) This discretion will not be questioned absent a positive showing of bad faith or fraud, neither of which have been alleged by Spacesaver. In fact, it would be virtually impossible to do so, since all of the bidders have certified that they are small businesses, rendering the entire question academic.

Fourth, Spacesaver has inferred that the Agency's landlord will be unable to install the specified shelving in compliance with the Fire Prevention Code. (Letter of 3 June 1983.) If, as Spacesaver alleges, the RFP specification was defective, then their protest is untimely and should have been filed prior to the closing date for receipt of proposals. Further, compliance with the Fire Prevention Code is, according to the Agency's lease agreement, the legal responsibility of [redacted] the Agency's landlord. The question is, therefore, a matter of contract administration under the separate lease agreement, and is inappropriate as a bid protest on this contract. Once again, however, the question is purely academic, [redacted]

STAT

STAT

Seymour Efros, Esquire

[] has provided the Agency with a letter from the Fairfax STAT
County Deputy Chief Fire Marshal advising [] STAT
that a halon or carbon dioxide fire suppression system will be
adequate to meet the Fire Prevention Code requirements.

An examination of the records in this matter, and the
following chronology of events, should clearly indicate that the
Spacesaver bid protest is without merit.

CHRONOLOGY

04 Feb 83 The CIA Office of Logistics received a request for
procurement of highly specialized mobile shelving
systems from the CIA Office of Security. It was
anticipated that the procurement would require
an expenditure of \$330,000.

14 Feb 83 The contracting officer, after having evaluated the
request, determined that a competitive procurement
would be appropriate. A detailed Statement of Work
was prepared, and a formal Request for Proposal
(RFP) was developed.

25 Feb 83 After further review and editing, RFP-83A-160 was
issued. The following vendors were selected for the
competition and issued a copy of RFP-83A-160. All
certified that they are small businesses.

Seymour Efros, Esquire.

Lundia/Nations Capitol
415 South Jefferson St.
Arlington, VA 22204

Spacesaver Corporation
10605 Concord St.
Kensington, MD 20895

National Office Systems
2000 N. 16th St.
Arlington, VA 22201

Stacor Corporation
285 Emmet St.
Newark, N.J.

REMCO Business Systems, Inc.
8000 Parston Dr.
Forestville, MD 20747

(withdrew prior to
bid submission)

28 Feb 83

The General Services Administration (GSA) was advised that the proposed procurement was anticipated to exceed the GSA Maximum Order Limitation of \$250,000 set forth in the Federal Property Management Regulations, Schedule 71-III-J (FSC, Group 71, Part III, Section J). The GSA mandatory requirements schedule, negotiated annually by GSA, would therefore be inapplicable to this procurement.

10 Mar 83

GSA was provided with a copy of the proposal and the list of vendors to be solicited.

11 Mar 83

A bidders conference was held at CIA Headquarters, with all bidders on the bidder's list represented and expressing interest in the procurement.

17 Mar 83

Amendment No. 1 to the RFP was issued in response to approximately sixteen points raised at the bidders conference and subsequent to the

Seymour Efros, Esquire

conference. These points included the types of file folders to be used; the configuration of the cabinets, or bays, and dividers; the leveling of the floor; and carpeting requirements.

24 Mar 83 GSA wrote to advise the CIA that our request for authority to purchase movable shelving exceeding the Maximum Order Limitation had been formally granted. GSA also requested that copies of the procurement documents be provided for their files after award of a contract.

28 Mar 83 Amendment No. 2 was issued, responding to three additional questions raised by the bidders after measuring and inspecting the building site. These questions concerned the minimum center aisle width, carpeting, and row length.

01 Apr 83 Stacor Corporation advised the contracting officer via telephone that it declined to bid, leaving four bidders in the competition.

07 Apr 83 Amendment No. 3 was issued, responding to four more questions asked by several of the bidders. These questions concerned end panels, individually controlled units, safety systems, and carpeting.

Seymour Efros, Esquire

- 19 Apr 83 The contracting officer concluded that the bidders should be provided with additional information and the opportunity to participate in further discussions on the procurement. All bidders were so advised by telephone. On the same day, proposals were received from all four bidders.
- 21 Apr 83 Amendment No. 4 was issued, providing clarification of the evaluation procedures and criteria.
- 25 Apr 83 The initial preliminary evaluation of the four proposals was conducted by representatives from the Office of Logistics and the Office of Security. It was determined that all four proposals were inadequate and incomplete.
- 26-28 Apr 83 Meetings were held with all four bidders to discuss the technical specifications and the CIA's requirements.
- 29 Apr 83 The Office of Security concluded that of the four proposals, that of Lundia most closely approached the needs of the Agency, although all four were still inadequate..
- 04 May 83 The contracting officer from the Office of Logistics concurred with the Office of Security. The Office of Security provided additional

Seymour Efros, Esquire

documentation supporting the need for contract performance by 1 September 1983. Amendment No. 5 was issued, setting COB 9 May 1983 as the deadline for final proposals.

06 May 83 Spacesaver notified the contracting officer that they would be unable to install the shelving in the required 19 days, between 13 August and 1 September 1983.

09 May 83 All four bidders submitted final proposals. They were reviewed and evaluated, and all found to be deficient in meeting the mandatory requirements.

10 May 83 Amendment No. 6 was issued, requesting that all bidders conform to the mandatory specifications cited in the RFP and subsequent amendments. A new deadline of COB 12 May 1983 was set for final proposals, and the requirement for 18-gauge steel was modified to also include 20-gauge or less.

12 May 83 All bidders submitted their final proposals in a timely fashion.

16 May 83 The four proposals were evaluated by Office of Logistics representatives, and all four were found to be deficient in meeting the mandatory specifications.

Seymour Efros, Esquire

- 17 May 83 The proposals were delivered to the Office of Security for review by their technical team.
- 18 May 83 The Office of Security concluded that all four proposals were deficient in meeting the mandatory specifications.
- 18 May 83 The contracting officer was advised by Office of Logistics and Office of Security personnel that construction of the building where the shelving was to be installed had encountered some minor obstacles and that the scheduled occupancy date was being set back to 30 September 1983. This would allow the specification on installation time to be relaxed from a requirement that installation be completed by 1 September and in a period of 19 days, to the new requirement that installation be completed by 30 September, within a 49-day period.
- 19 May 83 Amendment No. 7 was issued, incorporating the new installation requirement (30 September, 49 days.) The amendment also deleted an ambiguous specification and advised bidders that carpeting would be provided as Government-furnished equipment.
- 20 May 83 Letters were sent to each of the four bidders requesting that they clarify points in their respective proposals.

25 May 83 All bidders responded to the letters of 20 May 1983, and to Amendment No. 7 to the RFP.

26 May 83 All four bids were evaluated and all were found to be technically complete and acceptable. The contracting officer determined that the contract would be awarded to the lowest bidder. The bids were as follows:

Lundia/Nations Capitol	\$243,295.95
National Office Systems, Inc.	314,750.00
REMCO Business Systems, Inc.	227,341.60
Spacesaver Systems, Inc.	228,383.24

On the basis of their low bid, REMCO was awarded the contract. The contract was awarded by telephone, including the assignment of contract number 83-A822700-000 to the procurement.

27 May 83 All bidders were advised in person or by telephone of the contract award. Following notification, Spacesaver advised the contracting officer that it intended to file a bid protest with GAO. A bid protest was recorded as having been filed with GAO at 4:56 p.m. on 27 May 1983.

31 May 83 Spacesaver filed a second bid protest letter with GAO. The Agency sent REMCO written confirmation of the award.

02 June 83 All bidders were notified in writing of the contract award to REMCO. Spacesaver expressly asked Congressman Michael Barnes for his assistance in connection with the GAO bid protest.

Seymour Efros, Esquire

06 June 83 The contracting officer received a letter from GAO, dated 2 June 1983, advising him that a bid protest had been filed.

10 June 83 The contracting officer received a letter from GAO containing a copy of a letter filed by Spacesaver with GAO on 3 June 1983. On this same date, Congressman Michael Barnes wrote to the Director of Central Intelligence, advising him that Spacesaver was seeking assistance.

14 June 83 The CIA's landlord at the building site, [REDACTED] STAT
[REDACTED], which is responsible for compliance STAT
with all applicable building and fire code
requirements, received a formal notice from the
Fairfax County Deputy Chief Fire Marshal advising
[REDACTED] should install a halon or STAT
carbon dioxide fire suppression system with the
mobile filing system. Such a system would be in
compliance with the appropriate codes.

ISSUES PRESENTED

The four basic issues upon which Spacesaver Systems, Inc. (Spacesaver) bases their bid protest are cited in the Spacesaver letters to the General Accounting Office (GAO) of 27 May 1983, 31 May 1983, and 3 June 1983. Pertinent excerpts are included below.

Seymour Effros, Esquire

Please enter a protest on behalf of Spacesaver Systems challenging the assertion of Remco Business Systems that they satisfy all specifications of the subject RFP.

-Letter of 27 May 1983

1. The CIA did not use the GSA Federal Supply Schedule. The items requested are on schedule as a total small business set aside and three qualified small business firms are listed on schedule.

2. In addition to not buying on schedule, the CIA solicited this on an unrestricted basis when it should have been a total small business set aside. The reason it should be a small business set aside is that the Federal Procurement Regulations clearly states an item or service shall be set aside for exclusive small business participation if the contracting officer has reasonable expectations of sufficient offers will be received (sic) from small business so awards can be made at reasonable prices.

-Letter of 31 May 1983

P.S. We have talked with the Fire Marshall's Office of Fairfax County (phone #691-2331), and if the CIA has awarded a contract in accordance with their specifications, they are in violation of the Boca Fire Prevention Code/1975

F-305.3- Inside Storage: Storage in buildings and structures shall be orderly, shall not be within two (2) feet of the ceiling, and located so as not to obstruct egress from the building.

The Fire Marshall told us on the phone 6/3/83, that they had not received a waiver to this fire code regulation.

-Letter of 3 June 1983

The Spacesaver bid protest involves the award of CIA Contract No. 83-A822700-000 on 26 May 1983, to REMCO Business Systems, Inc. The first bid protest letter, filed with GAO the day after award of the contract, raises the first of the four issues.

Seymour Efrös, Esquire

I. REMCOS Capability to Perform the Contract - The initial issue raised by Spacesaver concerns the ability of REMCO to perform the contract, even though the contracting officer reviewed all proposals and determined that REMCO had presented a proposal that meets all mandatory specifications. Although Spacesaver does not elaborate on this point, elaboration is unnecessary. Under the rule cited in Aerosonic Corporation, supra, whether a contractor can perform a contract in compliance with contract requirements is a matter of contract administration and is not for consideration under GAO Bid Protest Procedures.

Regarding the protestor's suggestion that GAO check the actual contract performance to see if Waltham does deliver on schedule, it should be pointed out that whether the contractor is complying with the contract requirements is a matter of contract administration and not for consideration under our Bid Protest Procedures. See, Robert Burger Associates, Inc., B-188450, June 1, 1977, 77-1 CPD 378. It is the Air Force's responsibility to monitor the contract and to take the appropriate action if Waltham delivers late.

That decision also held that a determination of whether a bidder is capable of meeting the requirements of a solicitation requires an affirmative determination of responsibility, which GAO no longer reviews unless either fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which have not been applied. The Comptroller General ruled in that case:

Aerosonic alleges that Waltham is incapable of meeting the requirements of the RFP...Whether a bidder can meet the requirements of a solicitation requires a determination of responsibility. This Office no longer reviews protests against affirmative determinations of responsibility, unless either fraud is shown on the part

Seymour Efros, Esquire

of the procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See, Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Oregon Wilbert Vault Corporation, B-191000, January 18, 1978, 78-1 CPD 49. In the present case there is no allegation that the responsibility determination resulted from either fraud or that definitive criteria have not been applied.

In this instance the contracting officer reviewed REMCO's proposal and determined that it met all specifications, notwithstanding Spacesaver's challenge to the contrary. In addition, no allegation has been made by Spacesaver that fraud exists or that definitive criteria have not been applied. This rule has been consistently applied in several other Comptroller General decisions. In Colorado Research and Prediction Laboratory, Inc., B-199755, March 5, 1981, 81-1 CPD 170, it was held:

To the extent that Colorado Research is questioning the ability of Megapulse to conduct theoretical studies, the protest is not reviewable. Our Office does not review affirmative determinations of responsibility except where there is a showing of fraud or misapplication of definitive responsibility criteria. Security Assistance Forces and Equipment International, Inc., B-195196, July 10, 1980, 80-2 CPD 24.

In Precision Environments, Inc., B-198418, April 29, 1980, 80-1 CPD 306, it was held:

Whether the awardee is in fact performing in accordance with contract requirements is a matter of contract administration which is the function and responsibility of the procuring activity. Consequently, we do not consider such matters under our Bid Protest Procedures. School Transportation, B-192799, January 10, 1979, 79-1 CPD 12.

See also Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 CPD 29; and A.R.&S. Enterprises, Inc., B-197303, 80-2 CPD 17. Under well-established rules adopted by GAO, the awardee's

Seymour Efros, Esquire

ability to perform the contract in compliance with the specifications is a matter of contract administration, not for consideration under GAO Bid Protest Procedures.

II. Use of the GSA Federal Supply Schedule - The second issued raised by Spacesaver concerns the contracting officer's decision not to use the GSA Federal Supply Schedule. As the file clearly demonstrates, this action was taken with the express authorization of GSA, since the procurement was originally anticipated to exceed the Maximum Order Limitation established in the Federal Property Management Regulations, Group 71, Part III, Section J. The authorization letter from GSA, dated 24 March 1983, establishes the propriety of the subsequent procurement activities.

If Spacesaver objected to this procedure, which procedure was apparent on the face of the RFP, they failed to meet their responsibility of filing their bid protest in a timely fashion--before the closing date for the receipt of proposals. The rule is stated at 4 CFR § 21.2(b)(1):

Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation.

Seymour Efros, Esquire

In Precision Environments, Inc., supra, the bid protest was dismissed based on this consideration.

With respect to the second allegation, our Bid Protest Procedures require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. Since the allegation involves an alleged impropriety in the solicitation which was apparent prior to bid opening, it should have been raised prior to that date. The protest, however, was not received in our Office until after bid opening. Consequently, this allegation is untimely filed and not for consideration. Picker Corporation; Ohio-Nuclear, Inc., B-192565, January 19, 1979, 79-1 CPD 31.

In the present case, the bid protest was not filed until after the submission of several revised proposals and award of the contract, rendering the protest singularly untimely. See also Security Assistance Forces and Equipment International, Inc., B-195196, July 10, 1980, 80-2 CPD 24; Colorado Research and Prediction Laboratory, Inc., supra; and A.R.&S. Enterprises, Inc., supra.

III. Contracting Officer's Authority on Small Business Set-Asides - The third issue raised by Spacesaver challenges the authority of the contracting officer to determine that the procurement need not be a formal total small business set-aside. The decisions are quite clear on this question. In Bell & Howell, supra, the Comptroller General ruled:

Similarly, here, the contracting officer has broad discretion under the Small Business Act, 15 U.S.C. §§ 631, 644 (1976), and implementing regulations, FPR §§ 1-1.706.5 (1964 ed. amend. 192), whether or not to set aside a particular procurement. (Emphasis added.)

Seymour Efros, Esquire

The Comptroller General has indicated on several occasions that this broad discretion of the contracting officer will not be questioned unless there is a showing of bad faith or fraud. In Kinnett Dairies, Inc., B-187501, March 24, 1977, 77-1 CPD 209, for example, the Comptroller General decided:

Determination under ASPR § 1-706.5(a)(1) (1976 ed.) concerning both price reasonableness and whether adequate competition may reasonably be anticipated are basically business judgments requiring the exercise of broad discretion by the contracting officer. See Falcon Rule Company; Akron Rule Corporation, B-187024, November 16, 1976, 76-2 CPD 418; 45 Comp. Gen. 228 (1965). Therefore, in reviewing a set-aside protest situation, our Office will not substitute its judgment for that of the contracting officer and will sustain determinations concerning those matters absent bad faith or fraud. Tenco Construction Company, B-187137, December 21, 1976, 76-2 CPD 512; 45 Comp. Gen. supra.

In the present case, no such showing of bad faith or fraud has been made. The entire question is, in fact, moot, since an obvious effort was made to include small businesses on the bidder's list, and all of the eventual bidders, including the successful bidder, have certified with CIA that they are small businesses.

Spacesaver's objection to this procurement action not being a formal small business set-aside must also fail because it is untimely in the extreme. The nature of this procurement was clear on the face of the RFP and Spacesaver should have filed a bid protest before the closing date for receipt of proposals. In J.H. Rutter Rex Manufacturing Company, Inc., supra, the Comptroller General decided:

Seymour Efros, Esquire

Pursuant to section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. Consequently, Rutter Rex's protest against the set-aside is untimely since it should have been made prior to bid opening; therefore it will not be considered on the merits.

In the present case, Spacesaver delayed not only beyond the closing date for receipt of initial proposals, but also beyond three subsequent closing dates and the award of the contract.

The question of small business set-asides is, therefore, inappropriate for GAO consideration as a bid protest.

IV. The Responsibility of CIA's Landlord to Comply With Fire Code Requirements - As its fourth issue, Spacesaver has protested that [redacted] the CIA's landlord [redacted] [redacted] will be unable to meet the Fire Prevention Code requirements of Fairfax County, Virginia. Spacesaver has drawn this conclusion from their examination of the RFP and its amendments. If, as Spacesaver alleges, the technical specifications in the RFP are defective, then the bid protest is untimely under 4 CFR 20.2 (b)(1), and should have been filed before the closing date for receipt of proposals. See also, J.H. Rex Rutter Manufacturing Company, Inc., supra; and Precision Environments, Inc., supra.

The question of compliance with the Fairfax County Fire Prevention Code is a matter for which the CIA's landlord is legally responsible. The lease agreement [redacted]

STAT

STAT

STAT

Seymour Efros, Esquire

[] provides that the lessor shall provide fire protection STAT
systems in compliance with all applicable codes:

94. CODE VIOLATIONS

Equipment, services, or utilities furnished and activities of other occupants shall be free of safety, health, and fire hazards. When hazards are detected, they must be promptly corrected at the Lessor's expense. Where requirements conflict, the decision of the contracting officer shall be final

* * * * *

120. SPECIAL REQUIREMENTS . . .

B. The following is a general listing of special items that will be required: . . .

2. Special Fire Protection Systems - In addition to all standard fire protection and detection systems required by local codes and ordinances, the Government will require that all secure enclosures, as described elsewhere, be equipped with special fire detection systems. These may be either heat and rate of rise type or smoke detection type. In some cases, both may be required.

In light of the fact that this matter arises from a separate and distinct contract and is the legal concern of the landlord--not of CIA or the bidders on the shelving contract--the question is inappropriate for review by GAO as a bid protest. Although the question is irrelevant to this bid protest, nevertheless it should be noted that Spacesaver's concern is without foundation.

[] has provided the CIA with a letter dated 14 STAT
June 1983 from the Fairfax County Deputy Chief Fire Marshal, indicating that Code requirements will be satisfactorily met by installation of a halon or carbon dioxide fire suppression system. The letter states:

Seymour Efros, Esquire

[redacted] and I have reviewed the data submitted on the proposed filing systems at the above referenced project. We agree that sprinkler protection would be ineffective due to the file design; however we do not feel the installation of an early warning fire detection system meets the spirit or intent of the Code.

STAT

Therefore with respect to the above, an alternative suppression system, i.e. halon or carbon dioxide is to be installed.

If you have any questions or I can be of further assistance, please call me at your convenience.

Yours truly,

[redacted]
Deputy Chief Fire Marshal

STAT

It is the position of this Agency that, in light of the foregoing, the bid protest filed by Spacesaver Systems, Inc., is untimely and without foundation, and should be denied.

Sincerely,

[redacted]
Acting Chief, Procurement Division
Office of Logistics

STAT